Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Petitioner,

v.

W.R. GRACE & CO.—CONN. and
CHRYSLER MOTORS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Washington

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Tyler Pipe Indus., Inc. v. Washington Dep't of Rev.*, 483 U.S. 232 (1987), this Court held that a Washington tax exemption discriminated against interstate commerce and remanded for further proceedings. On remand, in *National Can Corp. v. Department of Rev.*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988), the Washington Supreme Court ruled that the discrimination holding in *Tyler Pipe* applied purely prospectively. None of the taxpayer-litigants in *Tyler Pipe* received any tax refunds for periods prior to the *Tyler Pipe* decision. Many years later, the Washington Supreme Court reversed course and applied *Tyler Pipe* retroactively. This conditional cross-petition presents the following question:

Whether, in view of this Court's repudiation of selective prospectivity in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), a new rule of law established by this Court, that was not applied retroactively to the litigants in the case announcing the new rule, may now be applied retroactively to other litigants in subsequent cases.

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, *Petitioner,*

v.

W.R.GRACE & CO.—CONN. and CHRYSLER MOTORS CORPORATION, *Respondents.*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

The State of Washington, Department of Revenue ("Department") respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Washington in *W.R. Grace & Co. v. Department of Rev.*, 137 Wash.2d 580, 973 P.2d 1011 (1999), only if the Court grants the petition for a writ of certiorari in No. 99-31, which was placed on the docket June 30, 1999.

OPINIONS BELOW

The decision of the Supreme Court of Washington, officially reported at 137 Wash.2d 580 and unofficially reported at 973 P.2d 1011, is reprinted in the appendix to the petition for writ of certiorari in No. 99-31 (Pet. App.) at 1a-59a.

The judgments of the Thurston County Superior Court are reprinted at Pet. App. 67a-71a (Order Denying Motions for

Reconsideration and Fixing Amount of Final Judgment, No. 94-2-02046-1) and in the appendix to this conditional cross-petition (Cross-Pet. App.) at 1a-5a (Order Denying Motions for Reconsideration and Fixing Amount of Final Judgment, No. 94-2-0079-6). Other relevant prior orders and opinions of the superior court in these two cases are reprinted at Pet. App. 60a-66a, 72a-91a.

JURISDICTION

The Supreme Court of Washington issued its opinion on April 1, 1999. This conditional cross-petition for a writ of certiorari is filed under Rule 12.5. The petition for a writ of certiorari in No. 99-31 was placed on the docket June 30, 1999. The Department believes this Court lacks jurisdiction over the petition in No. 99-31 because the decision of the Supreme Court of Washington is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a). *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 67-72 (1948). However, if this Court concludes that it has jurisdiction over the petition in No. 99-31, it also has jurisdiction over this conditional cross-petition under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Beginning in 1984, taxpayers brought over 300 actions challenging the constitutionality of Washington business and occupation (B&O) taxes on Commerce Clause grounds. Grace and Chrysler were among a group of 71 corporate taxpayers seeking refunds of Washington B&O taxes in *Tyler Pipe Indus., Inc. v. Washington Dep't of Rev.*, 483 U.S. 232 (1987). In *Tyler Pipe*, this Court held that the "multiple activities exemption" formerly in Wash. Rev. Code § 82.04.440 discriminated against interstate commerce. *Id.* at 240-48. This Court affirmed, however, the Supreme Court of Washington's holding that the selling B&O taxes paid by Tyler Pipe, Grace, Chrysler, and many other petitioning taxpayers were fairly apportioned. *Id.* at 248-51. The Department had argued in

Tyler Pipe that any decision adverse to the State should have only prospective application. Brief for Appellee at 44-48, Tr. of Oral Arg. at 44, *Tyler Pipe* (Nos. 85-1963 and 85-2006). Acknowledging the argument, this Court vacated the Supreme Court of Washington's judgments in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wash. 2d 318, 715 P.2d 123 (1986), and *National Can Corp. v. Department of Rev.*, 105 Wash. 2d 327, 732 P.2d 134 (1986), and remanded for further proceedings not inconsistent with its opinion. 483 U.S. at 251-53.

On remand, the Supreme Court of Washington held that this Court's discrimination holding applied purely prospectively, employing the federal civil retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *National Can Corp. v. Department of Rev.*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988) (*National Can II*). The *Tyler Pipe* taxpayers therefore were denied any refunds for taxable activities before June 23, 1987, the date of this Court's decision. After the ruling in *National Can II*, hundreds of other taxpayers dismissed their refund claims for tax periods prior to the *Tyler Pipe* decision.

On August 11, 1987, the Governor signed the 1987 two-way credit law, designed to eliminate the constitutional defects of the multiple activities exemption statute this Court identified in *Tyler Pipe*. 1987 Wash. Laws, 2d Ex. Sess., ch. 3. Under the 1987 law, all persons engaged in manufacturing or extracting activities in Washington must pay a manufacturing tax or an extracting tax. All persons engaged in selling in Washington must pay a retailing tax or a wholesaling tax. Persons paying a Washington selling tax may take a credit against that tax for any manufacturing tax or extracting tax paid on the same product to Washington or to any other jurisdiction. In addition, persons paying a Washington manufacturing tax or extracting tax and selling out-of-state can take a credit against those taxes for any selling tax paid on the same product to another jurisdiction. *See* Wash. Rev. Code § 82.04.440.

Section 3 of the 1987 law provided that such credits were the exclusive remedy available to taxpayers in the event a court were to deem relief appropriate regarding the former multiple activities exemption for any tax periods before the law's August 12, 1987 effective date. The availability of credits for selling, manufacturing, and extracting taxes paid to jurisdictions other than Washington corrected the constitutional defects identified by this Court in *Tyler Pipe*.

Grace and Chrysler, along with many other taxpayers, next challenged the 1987 two-way credit law, as well as the retroactive application of the two-way credits to the seven-week "interim period" after the *Tyler Pipe* decision from June 23 through August 11, 1987, claiming the 1987 law "discriminates against interstate commerce, violates principles of equal protection, and violates their right to due process of law." *American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 241, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990). In *American Nat'l Can*, the Supreme Court of Washington upheld the constitutionality of the 1987 two-way credit law and applied it retroactively to the seven-week interim period.

In July 1993, the Department issued three final tax assessments against Grace, covering tax periods from January 1980 through December 1990, for unpaid taxes and interest. Instead of paying the assessments, Grace filed in the superior court a complaint for declaratory judgment, injunctive relief, and damages against the Governor, the Attorney General, the Director of the Department, and the Department. The complaint alleged that, as to taxes assessed for periods through June 23, 1987, the defendants were seeking to collect taxes this Court had declared in *Tyler Pipe* to be in violation of the Commerce Clause. The complaint further alleged that, as to taxes assessed for periods after June 23, 1987, the defendants were seeking to collect taxes that, despite the 1987 amendment of Wash. Rev. Code § 82.04.440, continued to violate the Commerce Clause. The Department asserted a counterclaim

for the unpaid taxes, interest, and penalties. Grace later voluntarily dismissed the three individual defendants.

In February 1994, the Department issued tax assessments against Chrysler for unpaid taxes and interest covering tax periods from January 1984 through June 1988. In July 1994, while its administrative appeal of the assessments was still pending, Chrysler filed in the superior court a complaint similar to the complaint in *Grace* for declaratory judgment, injunctive relief, and damages against the Attorney General, the Director of the Department, and the Department. Chrysler later withdrew its administrative appeal and filed an amended complaint seeking declaratory and injunctive relief only against the Department, alleging Commerce Clause violations similar to those alleged in *Grace*. As in *Grace*, the Department asserted a counterclaim for the unpaid taxes, interest, and penalties.

The taxpayers and the Department filed cross-motions for partial summary judgment in both actions. The Department's motions sought dismissal of all claims of the taxpayers with prejudice on the basis of issue preclusion. The taxpayers' motions sought orders declaring that *Tyler Pipe* applied retroactively, that taxes imposed for any periods before June 23, 1987 were "void and unenforceable," that taxes imposed for any later periods discriminated against interstate commerce, and that neither claim preclusion nor issue preclusion barred the taxpayers' requested relief. In opposing the taxpayers' motions, the Department argued, among other things, that the *Tyler Pipe* discrimination holding was not applied to the litigants in that case, and that Grace and Chrysler were therefore urging as a choice-of-law rule a form of selective prospectivity precluded by *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

The superior court issued memorandum opinions in the two actions, which (1) denied the Department's motions for partial summary judgment based on issue preclusion, (2)

denied the taxpayers' motions except for granting them partial summary judgment that *Tyler Pipe* applied retroactively, and (3) *sua sponte* granted the Department partial summary judgment that the two-way credit law, when applied retroactively and prospectively to all the assessment periods, was constitutional.

Two months later, the superior court entered what purported to be "final judgments" pursuant to Wash. Super. Ct. Civ. R. 54(b) based on its memorandum opinions. (Pet. App. 72a-91a). Both the Department and the taxpayers filed motions for reconsideration, asking the superior court to reconsider its "final judgments." The taxpayers filed appeals to the Supreme Court of Washington in July 1996, long before the superior court heard argument on the parties' motions for reconsideration. The Supreme Court of Washington on its own initiative ordered the two cases consolidated for purposes of appellate review and granted the taxpayers' motion for a stay until the superior court resolved the motions for reconsideration.

While the parties' motions for reconsideration were still pending in the superior court, the Supreme Court of Washington issued its decision in *Digital Equip. Corp. v. Department of Rev.*, 129 Wash. 2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997). Digital was a Massachusetts corporation seeking a full refund of the selling B&O taxes it had paid from January 1, 1983 through August 11, 1987, for its sales in Washington of products it manufactured outside Washington, contending that *Tyler Pipe* held the taxes discriminated against interstate commerce. In its moving papers, Digital admitted it did not pay any manufacturing or extracting gross receipts taxes to any other jurisdiction for any of the products it sold in Washington during those periods. The superior court in *Digital* had dismissed Digital's refund action with prejudice in November 1994, relying primarily on the Supreme Court of Washington's decisions in *National Can II* and *American Nat'l Can*.

The Supreme Court of Washington unanimously affirmed the superior court's summary judgment in *Digital*. There were three separate opinions supporting the affirmance, however, and none of the three expressed the *ratio decedendi* of a majority of the court for its unanimous judgment.

A three-judge lead opinion in *Digital* announced the judgment of the court affirming the superior court's dismissal of Digital's refund claim. In essence, the three judges reasoned that this Court's remand order in *Tyler Pipe* did not allow the Supreme Court of Washington to consider whether the Commerce Clause discrimination ruling in *Tyler Pipe* applied purely prospectively. Thus, the three judges believed that the court in *National Can II* had erroneously addressed an issue that was not left open by the mandate. 129 Wash. 2d at 186-89, 194. Because *Tyler Pipe* had to be applied retroactively to Digital's refund claim, they reasoned, Digital could claim credits under the 1987 two-way credit law for any qualifying gross receipts taxes paid to other jurisdictions for all periods before August 12, 1987. Digital was entitled to no relief, however, because it admitted it paid no gross receipts taxes to any other jurisdiction on products sold in Washington during such periods. *Id.* at 189-95.

A two-judge concurring opinion in *Digital* concurred in the result that Digital was "not entitled to any relief" but disagreed with the lead opinion's reasoning. *Id.* at 195. Although they stated in dictum that they disagreed with the prospectivity holding in *National Can II*, *id.* at 195 & n.76,[1] the two judges reasoned that the lead opinion "should not casually assume" (1) that "an out-of-state manufacturer" like Digital "has a valid discrimination claim under the old multiple

[1] In essence, they concluded that *Tyler Pipe* was not an overruling decision and that the first prong of the *Chevron Oil* civil retroactivity test therefore had been applied incorrectly in *National Can II*. *But see Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 (1990) (*Tyler Pipe* "arguably 'overturn[ed] a lengthy list of settled decisions' and 'revolutionize[d] the law of state taxation[.]'" (quoting *Tyler Pipe*, 483 U.S. at 257 (Scalia, J., concurring in part and dissenting in part))).

activities exemption" or (2) that "the 1987 two-way credit scheme is the appropriate remedy for such discrimination." *Id.* at 195-96.

In their view, *Tyler Pipe* did not hold that the multiple activities exemption discriminated against out-of-state manufacturers like Digital paying selling B&O taxes to Washington. *Id.* at 199-200, 202. Moreover, they reasoned, the Supreme Court of Washington had never "actually held that out-of-state manufacturers are entitled to relief under *Tyler Pipe* or that a credit for out-of-state manufacturing taxes is necessary." *Id.* at 201. Applying their analysis of *Tyler Pipe* to Digital, they concluded:

> *Tyler Pipe* held that the [multiple activities exemption] discriminated against Washington manufacturers who sold their products outside the state. 483 U.S. at 253. Our determination in *B.F. Goodrich Co.* [*v. State*, 38 Wash. 2d 663, 231 P.2d 325, *cert. denied*, 342 U.S. 876 (1951),] that out-of-state manufacturers cannot complain of the discriminatory effect of the [multiple activities exemption] has not been reversed. Nevertheless, Digital asserts that it is entitled to a refund for the wholesale taxes it has already paid. We can easily dispose of that claim on its merits.

Id. at 202 (footnotes omitted). Thus, the two "concurring" judges reasoned that out-of-state manufacturers like Digital have no "valid discrimination claim[s] under the old multiple activities exemption" for any periods through August 11, 1987–regardless of whether *Tyler Pipe* applies retroactively.

A four-judge "dissenting" opinion in *Digital* (more accurately labeled as the plurality opinion) also concurred in the judgment, but employed different reasoning than either of the other opinions to explain the unanimous result. The four judges discussed only the retroactive application of *Tyler Pipe*, an issue related to only one of the tax periods at issue in *Digital* –the period from January 1, 1983 through June 23, 1987. As to

that period, the four judges concurred in the result because *Tyler Pipe* applies prospectively only. *Id.* at 205-10. They disagreed sharply with the lead opinion's reasoning that this Court applied the new rule announced in *Tyler Pipe* to the parties in *Tyler Pipe*:

> [I]n *Tyler Pipe* (the case announcing the new rule at issue here) the Supreme Court *did not apply the rule to the litigants before it.* It left open the issue of retroactivity for this court to decide. It did not, as the majority [sic] suggests, simply remand for a remedy; it also remanded for the determination of retroactivity. We decided that question under the then applicable law. The Supreme Court declined review and the case was closed. Nothing in *Beam Distilling* or *Harper* changes our decision.

Id. at 209. They also noted that the lead opinion resulted in "the very unfairness that the Supreme Court decried in *Beam Distilling*; that is, that the new rule applied to the litigants but not to others similarly situated." *Id.* at 209-10 (footnote omitted). Indeed, they explained, the lead opinion's reasoning resulted in

> an even greater injustice because those that successfully litigated the issue in *Tyler Pipe* were denied the retroactive application of the new rule to past events while those unrelated to the case now receive retroactive application of the new rule to taxes they paid before the date the tax was declared unconstitutional. In *Beam Distilling*, the Court explained that principles of equality and stare decisis dictate that "similarly situated litigants should be treated the same," and therefore a new rule cannot be applied retroactively to some litigants when it is not applied retroactively to others. *Beam Distilling*, 501 U.S. at 540, 542-43 (Souter, J.).

129 Wash. 2d at 210. Thus, the four "dissenting" judges reasoned that the superior court in *Digital* should be affirmed

as to any tax periods before June 23, 1987 because the former multiple activities exemption was constitutional until that date.

After *Digital* was issued, the superior court requested additional briefing on the effect of that decision in *Grace* and *Chrysler*. In a joint letter opinion and order issued in December 1996 in *Grace* and *Chrysler*, the superior court eventually denied the parties' motions for reconsideration and concluded that *Digital* confirmed its earlier ruling that *Tyler Pipe* applies retroactively. (Pet. App. 60a-66a) In January 1997, the Department filed timely appeals to the Supreme Court of Washington, seeking review of the joint letter opinion and order and the two "final judgments" entered in June 1996.

At that point the superior court still had not resolved the Department's cross-claims in *Grace* and *Chrysler*. After determining the amounts of the Department's judgments against Grace and Chrysler, the superior court entered in June 1997 final summary judgment orders in the two cases. (Pet. App. 67a-71a; Cross-Pet. App. 1a-5a)

In July 1997, the Department filed timely supplemental appeals to the Supreme Court of Washington in both cases, seeking review of the June 1997 final summary judgment orders. Neither Grace nor Chrysler appealed from those final orders.

Among other arguments presented on appeal, the Department renewed its argument made to the superior court that because this Court's discrimination ruling in *Tyler Pipe* was not applied to the parties in that case, it cannot now be applied to tax periods before June 23, 1987, without conflicting with this Court's repudiation of "selective prospectivity" in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

The Supreme Court of Washington decided that federal question against the Department, ruling that this Court's *Tyler Pipe* discrimination ruling now applies retroactively to all tax periods before June 23, 1987, even though it was applied

purely prospectively in *National Can II*. 137 Wash. 2d at 592-93, 973 P.2d at 1017 (Pet. App. at 12a-13a).

The Supreme Court of Washington did not decide, however, several other federal and state law questions raised by the Department. Instead, it "preserved" those issues "for trial court resolution on remand[.]" 137 Wash. 2d at 584, 973 P.2d at 1013 (Pet. App. at 2a). Although the court declined to decide those issues, the court commented that they were "plainly the most significant and meritorious" of the issues presented in the Department's cross-appeals. 137 Wash. 2d at 591, 973 P.2d at 1016 (Pet. App. at 10a).

The court noted in particular that "Grace and Chrysler were parties in both *National Can I/Tyler Pipe* and *American Nat'l Can*." *Id.* It explained that "[t]he former case rejected the taxpayers' apportionment argument" and that *American Nat'l Can* both "noted the resolution of the apportionment claim in *Tyler Pipe*" and "rejected taxpayers' constitutional challenges to Washington's amended B&O tax scheme." *Id.*. It further noted that the taxpayers in *American Nat'l Can*, including Grace and Chrysler, "conceded Washington's B&O tax is fairly apportioned." 137 Wash. 2d at 591 n.7, 973 P.2d at 1016 n.7 (Pet. App. at 10a). In conclusion, it stated:

> Thus, with respect to many of the issues raised by the taxpayers, they may well have had their day in court on those issues, although the taxpayers assert that the United States Supreme Court jurisprudence on taxation and the Commerce Clause requires these issues to be re-examined.

137 Wash. 2d at 591, 973 P.2d at 1016 (Pet. App. at 10a).

The court explained that "given our disposition of this case" (remand to the trial court for further action consistent with its opinion), the court deemed it "unnecessary at this time" to address the issue preclusion questions "decided by the trial court in *Grace/Chrysler*." 137 Wash. 2d at 592 n.8, 973 P.2d at 1017 n.8 (Pet. App. at 11a). The court underscored,

however, that its review of these issues was "specifically reserved . . . should further review be required." *Id.*

After briefly addressing the *Tyler Pipe* retroactivity issue raised by the Department and then rejecting all the taxpayers' constitutional arguments, the court stated in conclusion it was "affirm[ing] the trial court judgments on these key points" and "remand[ing] the cases to the trial court for further action consistent with this opinion." 137 Wash. 2d at 604, 973 P.2d at 1022 (Pet. App. at 25a).

REASONS FOR GRANTING THE WRIT

The Department believes the decision below is not a "final judgment or decree" of the Supreme Court of Washington within the meaning of 28 U.S.C. § 1257(a). In any event, the Department was willing to let stand the only adverse portion of the decision below unless the taxpayers petitioned for a writ of certiorari. Accordingly, it did not file a petition within the time limits for petitions generally. For the reasons explained in the Department's brief in opposition in No. 99-31, this Court should not grant that petition. If the Court were to grant the petition in No. 99-31, however, the Court also should grant this petition.

The Department has filed this conditional cross-petition in response to the joint petition of Grace and Chrysler in No. 99-31 because the judgment the trial court awarded to the Department against Chrysler would be logically inconsistent with the argument presented in this cross-petition. *See Le Tulle v. Scofield*, 308 U.S. 415, 421-22 (1940). The trial court's judgment allowed Chrysler to claim credits for manufacturing gross receipts taxes it paid to other jurisdictions, thereby reducing the amount of the Department's B&O tax assessment against Chrysler by $125,929. (Pet. App. at 70a) Most of those credits related to tax periods between January 1984 and June 1987. Chrysler is not entitled to credits for such tax periods unless *Tyler Pipe* applies retroactively. This cross-petition thus appears to be necessary with respect to Chrysler.

In contrast, the judgment the trial court awarded against Grace would be unaffected if the Department were to prevail in this Court on the *Tyler Pipe* retroactivity issue. Like the taxpayer in *Digital Equip. Corp. v. Department of Rev.*, 129 Wash. 2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997), Grace did not pay any gross receipts taxes qualifying for the two-way credits during any of the tax periods at issue. (Cross-Pet. App. at 3a-4a) Therefore, this cross-petition is not necessary to enable the Department, as the prevailing party below, to defend its judgment against Grace on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the courts below. *California v. Grace Brethren Church*, 457 U.S. 393, 404 n.14 (1982); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).[2]

Although the Department is willing to accept the result below, if the Court grants the petition in No. 99-31, it should also grant this conditional cross-petition for two reasons. First, the question presented in this cross-petition is inextricably tied to the Due Process questions presented in No. 99-31. Second, the Supreme Court of Washington's decision to now apply this Court's discrimination ruling in *Tyler Pipe* retroactively conflicts with *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

I. The Selective Prospectivity Issue Presented in this Petition Is Inextricably Tied to the Taxpayers' Due Process Issues Presented in No. 99-31.

In their petition for a writ of certiorari in No. 99-31, Grace and Chrysler present four questions. The first three involve objections under the Due Process Clause to the retroactive application of the 1987 two-way credit law to

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[2] In its brief in opposition in *Digital*, the Department raised the issue whether *Tyler Pipe* applies retroactively to defend its judgment against Digital. Brief in Opposition at 27, *Digital* (No. 96-1274).

periods before June 23, 1987, the date of *Tyler Pipe*, as the exclusive remedy for retroactive application of the Commerce Clause discrimination holding in *Tyler Pipe*. (Pet. at i, 14-16, 18-19, 21-23) The taxpayers' Due Process questions are insubstantial and the Court should not grant the petition in No. 99-31 to review those questions.

If the Court were to grant the taxpayers' petition to review any of the taxpayers' Due Process questions, however, it also should grant this petition to review the Department's selective prospectivity issue. Grace and Chrysler obviously are entitled to no relief under the Due Process Clause for pre-*Tyler Pipe* periods unless the B&O taxes assessed against them for such periods impermissibly discriminated against interstate commerce. Thus, retroactive application of *Tyler Pipe* is a necessary premise underlying each of the taxpayers' Due Process questions. That is why the Supreme Court of Washington below addressed the threshold question of the retroactivity of *Tyler Pipe* before addressing the taxpayers' constitutional arguments. 137 Wash. 2d at 592-603, 973 P.2d at 1017-1022 (Pet. App. at 12a-24a).

Indeed, because the question whether *Tyler Pipe* applies retroactively is a "necessary predicate" to each of the taxpayers' Due Process questions, it should be regarded as a subsidiary question "fairly included" in each of those questions. *Cf. Caspari v. Bohlen*, 510 U.S. 383, 388-90 (1994) (every habeas corpus petition by a state prisoner presents at the threshold the question whether the rule involved is a "new" rule that cannot be applied retroactively). Since the Department has preserved the selective prospectivity question below, it cannot properly be ignored if the Court were to review any of the Due Process questions presented by the taxpayers.

Moreover, this Court traditionally refuses "to decide constitutional questions when the record discloses other grounds of decision," regardless of whether the other grounds have been properly presented by the parties before the Court.

McNeese v. Southern Ry. Co., 350 U.S. 77, 78 (1955). *See United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). The selective prospectivity question presented here is a nonconstitutional ground that would permit the Court to avoid deciding the taxpayers' Due Process questions. *See Beam*, 501 U.S. at 540 (Souter, J., announcing the judgment) (rejection of selective prospectivity based on "principles of equality and *stare decisis*"); id. at 545-46 (White, J., concurring in the judgment) (no precedent in civil cases for applying a new rule to the parties in the case but not to others similarly situated; defending pure prospectivity "in proper cases"); *id.* at 549-50 (O'Connor, J., dissenting) (rejecting proposition that prospective application is inconsistent with Art. III); *Harper*, 509 U.S. at 94-99 (adopting a rule "that fairly reflects the position of a majority of Justices in *Beam*"); *id.* at 110-111 (Kennedy, J., concurring in part and concurring in the judgment) (retroactivity in civil cases continues to be governed by *Chevron Oil*; disagreeing with selective prospectivity rule, based on Justice Souter's opinion in *Beam*, adopted by Court); *id.* at 113-22, 136 (O'Connor, J., dissenting) (nothing in the Constitution requires the rule prohibiting selective prospectivity in civil cases).

Simply put, the Due Process issues in the petition in No. 99-31 are inextricably tied to the question of selective prospectivity presented in this conditional cross-petition.

II. The Supreme Court of Washington's Decision to Apply *Tyler Pipe* Retroactively Conflicts with This Court's Rejection of Selective Prospectivity in *Beam* and *Harper*.

In *Beam*, 501 U.S. 529 (1991), this Court held that when a rule of federal law has been applied to the litigants in an overruling decision, the same rule of law must be applied to all similarly situated litigants whose cases were not yet final at the time of the overruling decision. *Id.* at 544 (Souter, J., announcing the judgment of the Court). Justice Souter's lead

opinion in *Beam* explained that principles of equality and stare decisis dictate that "similarly situated litigants should be treated the same," and therefore a new rule cannot be applied retroactively to some litigants when it is not applied retroactively to others. *Id.* at 542-43. Justice Souter's opinion carefully avoided any issue concerning pure prospectivity:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

Id. at 544. Thus, the holding in *Beam* was a repudiation of selective prospectivity, but not of pure prospectivity.

Two years later, in *Harper,* 509 U.S. 86, 96 (1993), this Court reasoned that in *Beam* "a majority of Justices agreed that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." This Court held in *Harper* that "*Beam* controls this case" and adopted a rule that "fairly reflects the position of a majority of the Justices in *Beam*." *Id.* at 97. This Court stated the controlling rule from *Beam* as:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. Thus, *Harper* reiterated the rule announced in Justice Souter's lead opinion in *Beam*. *Beam* and *Harper* both rejected selective prospectivity, but not pure prospectivity.

The Supreme Court of Washington did not discuss the Department's arguments that *Beam* and *Harper* had rejected selective prospectivity. Instead, the court affirmed the superior

court's ruling on this issue based only on "principles of *stare decisis*," concluding that a majority of the court in *Digital* had held that *Tyler Pipe* applied retroactively. Invoking the rule that "[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds," the court concluded that five of its members in *Digital*, in the lead and concurring opinions, "indicated *Tyler Pipe* applies retroactively," although they expressed "different reasoning for their conclusions." 137 Wash. 2d at 592-93, 973 P.2d at 1017 (Pet. App. at 12a-13a).

In *National Can Corp. v. Department of Rev.*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988) (*National Can II*), the Supreme Court of Washington held that the Commerce Clause discrimination ruling this Court announced in *Tyler Pipe* applied purely prospectively, employing the federal civil retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Washington court thus held that the multiple activities exemption invalidated under the new rule announced in *Tyler Pipe* was constitutional during all tax periods before June 23, 1987, the date of the *Tyler Pipe* decision. *See* 109 Wash. 2d at 881.

Since the discrimination holding in *Tyler Pipe* was purely prospective, the taxpayer-litigants in that case did not receive any relief for periods prior to the *Tyler Pipe* decision. Moreover, once the issue of prospective application was resolved in *National Can II*, hundreds of taxpayers subsequently dismissed their refund claims for such pre-*Tyler Pipe* periods. Now, years later, the Supreme Court of Washington has reversed course and applied *Tyler Pipe* retroactively. As a result, *Tyler Pipe* has been applied prospectively to some litigants and retroactively to others.

This is exactly the kind of selective prospectivity this Court condemned in *Beam* and *Harper*. Justice Souter's opinion in *Beam* emphasized that the rejection of selective

prospectivity "precludes retroactive application of a new rule to some litigants when it is not applied to others." 501 U.S. at 543. He explained that "allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of 'new' rules." *Id.*

By allowing Grace and Chrysler to relitigate the prospective application of *Tyler Pipe*, the Washington Supreme Court has undercut established precedent. This presents a significant conflict with *Beam* and *Harper* that should be resolved by this Court, if the petition in No. 99-31 is granted.

CONCLUSION

For the foregoing reasons, the conditional cross-petition should be granted if the petition in No. 99-31 is granted.

Respectfully submitted.

CHRISTINE O. GREGOIRE
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DONALD F. COFER*
Assistant Attorney General
Counsel for Petitioner
*Counsel of Record

July 30, 1999

APPENDIX

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

No. 94-2-0079-6

W.R. GRACE & CO.—CONN.,

Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Defendant.

Summary of Judgment

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

1. Judgment Creditor:	State of Washington, Department of Revenue
2. Judgment Creditor's Attorney:	Donald F. Cofer, Assistant Attorney General
3. Judgment Debtor:	W.R. Grace & Co.—Conn.
4. Amount of [Principal]:	$654,267.00
5. Amount of Interest Owed to Date of Judgment:	$657,268.00
[Total Judgment Amount:	$1,311,535.00]
6. Total of Taxable Costs and Attorneys Fees:	$125.00

Order

This matter came before the Court on the parties' cross-motions for reconsideration of the Final Judgment on Cross-Motions for Summary Judgment Granting the Motions in Part and Denying in Part entered June 28, 1996 (the "Final Judgment"), plaintiff's Motion Opposing Inclusion of Penalties in the Final Judgment and the Court's request that the parties submit calculations regarding the amounts includable in the judgment. The Court has considered its Letter Opinion and Order dated December 18, 1996; the Final Judgment; the pleadings, papers and evidence recited therein and the pleadings, papers and evidence filed or submitted in relation to the motions including the following:

1. Affidavit of Timothy Cremin together with exhibits, filed June 14, 1996;
2. Second Affidavit of Donald F. Cofer together with exhibit, filed June 14, 1996;
3. [Plaintiff's] Motion for Reconsideration of Judgment on Cross Motions for Summary Judgment, filed July 8, 1996;
4. Plaintiff's Memorandum in Support of Motion for Reconsideration, filed July 8, 1996;
5. Defendant's Motion for Reconsideration, filed July 8, 1996;
6. Second [sic] Affidavit of Donald F. Cofer together with exhibits, filed July 8, 1996;
7. Third Affidavit of Donald F. Cofer together with exhibits, filed July 8, 1996;
8. Plaintiff's Opening Brief Opposing Inclusion of Penalties in Final Judgment, filed August 16, 1996;
9. Defendant's Memorandum in Response to Plaintiff's Motion to Preclude Penalties for Nonpayment of Tax, filed September 3, 1996;
10. Grace's Opposition to Defendant's Motion for Reconsideration, filed September 9, 1996;

11. Defendant's Memorandum in Response to Plaintiff's Motion for Reconsideration filed September 9, 1996;

12. Fourth Affidavit of Donald F. Cofer together with exhibits, filed September 9, 1996;

13. Second Affidavit of Timothy Cremin together with exhibits, filed September 11, 1996;

14. Plaintiff's Reply Brief Opposing Inclusion of Unassessed Penalties in Final Judgment, filed September 16, 1996;

15. Defendant's Memorandum in Response to the Second Affidavit of Timothy Cremin, filed November 14, 1996;

16. Fifth Affidavit of Donald F. Cofer together with exhibit, filed November 15, 1996;

17. Defendant's Memorandum Regarding Effect of the Digital Equipment case on this case, filed November 22, 1996; and

18. Plaintiff's Reply to Defendant's Memorandum Regarding the Second Affidavit of Timothy Cremin, filed December 4, 1996.

19. Plaintiff's Brief Regarding Calculation of Interest, filed June 13, 1997.

20. Defendant's Brief Regarding Calculation of Interest Filed June 13, 1996.

The Court considered the Second [sic] and Third Affidavits of Donald F. Cofer together with exhibits, both filed July 8, 1996, as evidence soley for purposes of defendant's issue preclusion (collateral estoppel) defenses. The Court did not consider these affidavits in its summary adjudication of the merits of Plaintiff's claims.

Based on the arguments of counsel, the Final Judgment, this Court's Letter Opinion and Order dated December 18, 1996 and the pleadings, papers, and evidence presented, the Court finds that plaintiff is not entitled to any multiple activities tax credit for the period January 1, 1980, through December 31, 1990.

NOW, THEREFORE, based on the above findings the Court hereby orders that

1. Defendant Department of Revenue's Motion for Reconsideration is denied.

2. Plaintiff W.R. Grace's Motion for Reconsideration is denied.

3. Plaintiff W.R. Grace's Motion Opposing Inclusion of Penalties in the Final Judgment is granted.

4. The amount of the judgment in favor of the Department of Revenue recited in paragraph 6 of the Final Judgment be and hereby is fixed in the amount of $686,501.00 (the total of the additional assessment against Grace for the tax periods from January 1, 1980 through December 31, 1990) less an adjustment in the amount of $32,234.00 to correct a matter not at issue in this action, plus interest through June 20, 1997, in the amount of $657,268.00 for a total judgment in favor of the Department of Revenue of $1,311,535.00.

Dated this 20th day of June, 1997.

/s/ R. D. Hicks

THE HONORABLE RICHARD D. HICKS

Presented by:
BOGLE & GATES, P.L.L.C.

/s/ John T. Piper
/s/ Scott M. Edwards
John T. Piper, WSBA # 2910
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Scott M. Edwards, WSBA # 26455
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W.R. Grace & Co.—Conn.

Notice of presentation waived:

CHRISTINE O. GREGOIRE
Attorney General

/s/ Donald F. Cofer
Donald F. Cofer, WSBA # 10896
Assistant Attorney General
Attorneys for Defendant
Washington State Department of Revenue